# In the Supreme Court of the United States

OCTOBER TERM, 1968

**No. 776**

UTAH PUBLIC SERVICE COMMISSION,
*Appellant,*

vs.

EL PASO NATURAL GAS COMPANY, et al,
*Appellees.*

On Appeal from the United States District Court
for the District of Utah

## Petition for Rehearing or in the Alternative *Sua Sponte* Modification of Opinion

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Pacific Gas and Electric Company, Intervenor in *United States v. El Paso Natural Gas Co., et al.*, designated Civil Action Number C-143-57 in the United States District Court for the District of Utah, petitions for rehearing or in the alternative *sua sponte* modification of the Opinion herein issued June 16, 1969.

Said Opinion injures Petitioner and other existing California gas customers of Appellee El Paso Natural Gas Company (El Paso) and the consumers they serve.

Petitioner has substantial and vital interests affected by these proceedings. It is a regulated public utility serving

the gas and electric needs of most of northern and central California. It is a purchaser of large volumes of gas for distribution to its customers and to fuel its steam electric generating plants.

Petitioner presently purchases approximately 1.1 billion cubic feet of natural gas per day from El Paso Natural Gas Company at the California-Arizona border under long-term contracts. Petitioner transmits this gas through its own extensive transmission system to its distribution area. The sale of this daily volume of gas to Petitioner by El Paso was authorized by the Federal Power Commission under the Natural Gas Act upon an evidentiary demonstration that El Paso had adequate reserves of natural gas under its control by ownership or contracts with gas producers to support delivery of such daily volume for a period of time sufficient to justify the cost to El Paso and to Petitioner of the facilities required to transmit such volume from the producing area to the distribution area served by Petitioner.

Petitioner depends upon the daily volume of gas it purchases from El Paso to meet its demand for gas in its distribution area by its gas customers and its electric customers whose electric service is dependent in large part upon the availability of natural gas to fuel electric generating plants.

Petitioner participated in the proceeding before the District Court as an intervenor permitted to intervene under *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) to protect its interest in the continuation of its supply of gas from El Paso and its interest in preventing, if possible, any increases, resulting from the divestiture, in the cost to El Paso of continuing to serve Petitioner if such costs would be of the type which could be passed on to Petitioner in a rate increase proceeding before the Federal Power Commission.

## GROUNDS FOR REHEARING OR IN THE ALTERNATIVE SUA SPONTE MODIFICATION OF THE OPINION

The divestiture decree of Judge Chilson did not adversely affect any of the interests Petitioner was seeking to protect. Petitioner therefore did not seek to appeal the decree. Nor did Petitioner have reason to view with concern the Notice of Appeal and the Jurisdictional Statement filed herein by the Utah Public Service Commission (Utah). The appeal of Utah questioned the qualifications of Colorado Interstate Gas Company to own and operate the properties to be divested and not the adequacy of the reserves to be divested.

Petitioner, relying upon the Rules of this Court and its time-honored practices, knew that if the appeal of Utah was not dismissed by the Court the issues raised by that appeal would be the subject of briefs and oral argument before this Court and that Petitioner would have a right to participate to protect its interests. It further knew that issues not raised by the appeal of Utah would not be before the Court and would not be heard.

Petitioner also knew the subject of the hearing on April 29, 1969 was on the narrow issue of whether the appeal of Utah could be withdrawn, that if it were not permitted to be withdrawn the normal briefing schedule and oral argument would thereafter follow, and that the issues to be briefed would be those raised by Utah, or any other issues legitimately raised by others, and that each party and intervenor in the proceeding below would have an opportunity to brief and argue all issues raised.

However, issues raised by no participant, argued by none, not before this Court under established rules of practice and not in fact heard by this Court, one of which seriously affects Petitioner's interests, were decided in a summary manner.

At pages 4-5 of the Opinion this Court said:

> "Concededly the total reserves of the New Company will not be sufficient to meet the old Northwest's existing requirements and those of a California project.
>
> • • •
>
> "The purpose of our mandate was to restore competition in the California market. An allocation of gas reserves should be made which is 'equitable' with that purpose in mind. The position of the New Company must be strengthened and the leverage of El Paso not increased. That is to say, an allocation of gas reserves —particularly those in the San Juan Basin—must be made to rectify, if possible, the manner in which El Paso has used the illegal merger to strengthen its position in the California market. The object of the allocation of gas reserves must be to place New Company in the same relative competitive position *vis-a-vis* El Paso in the California market, as that which Pacific Northwest enjoyed immediately prior to the illegal merger.
>
> "A reallocation of gas reserves under this standard may permit an applicant other than Colorado Interstate Corporation to acquire New Company and make it a competitive force in California. Thus, the District Court is directed to effect this reallocation of gas reserves, and in light of the reallocation, to reopen consideration of which applicant should acquire New Company." ..... U.S. at .....

This language seems to direct the District Court to allocate reserves to the New Company from the San Juan Basin sufficient to support a new pipeline project to California.

This direction was made without the benefit of written and oral argument developing the damage to the gas-consuming public of California of such an allocation. The direction was made without notice to that consuming public, and distributors who serve them, of this danger to their gas

supply and hence without an opportunity afforded them to protect their substantial interests. As a result, Petitioner was deprived of its day in court to protect the interests of its customers.

The language of the direction need not go as far as it did to accomplish the overall purpose of the Opinion. The language could be restricted, and we submit should now be restricted by a *sua sponte* modification of the Opinion to eliminate the danger to the reliability of Petitioner's gas supply. After all, El Paso's California customers are innocent of any wrong and are the very victims of the Clayton Act violation the Court seeks to benefit by the divestiture.

The allocation of reserves under the decree below is as follows based on reserves as of January 1, 1967. ..... F.Supp. at .....

| | New Company | EPNG |
|---|---|---|
| San Juan, bcf | 3,207 | 11,509 |
| % | 21.8 | 78.2 |
| Total System Reserves, bcf | 9,256 | 30,165 |
| % | 23.5 | 76.5 |
| 1966 Requirement, bcf | 343 | 1,268 |
| Reserve Life Index, Years | 27.0 | 23.8 |
| Deliverability Life, Years | 12 | 10 |

The District Court found that El Paso could not transfer additional reserves to New Company sufficient to support a new California project without jeopardizing El Paso's ability to continue serving its southern division customers, including Petitioner. Judge Chilson found:

> "If the division of the reserves is to be measured by the requirements of New Company to serve the Northwest division and to supply a project by which New Company would compete in the California market, the Court finds, and it is admitted by most of the parties in interest if not all of them, that the present total system reserves by any estimate in evidence are not

> sufficient to meet those requirements of New Company and the requirements of the southern division. To divest to New Company reserves to meet the above requirements would necessarily require the invasion of reserves which are dedicated to the service of the southern division." ..... F.Supp. .....

Although the record contains several estimates of the reserves required to support a new pipeline project to California, no specific estimate or range of estimates was referred to by Judge Chilson in his above finding. However, one estimate may be considered as an illustration of the magnitude of the reserves that might be divested from El Paso under the Court's direction and thereby show the potential damage to the California gas consumers of the Court's direction.

Pacific Western Pipeline Corporation, one of the applicants for acquisition, introduced into evidence a detailed study by Bechtel Corporation of two alternative projects to deliver gas to the California-Arizona border.[1] (Pacific Western Ex. 11, R. .....) One would transport gas from the San Juan Basin and the other from the Delaware Basin of West Texas. The San Juan project was the more modest of the two and would require less reserves. It would deliver 400 million cubic feet of natural gas per day to the California border near Topock, Arizona. The study concluded that gas reserves in the magnitude of 4.5 trillion cubic feet would normally be required to support such a project.

Thus on the basis of the record in this case, approximately 4.5 trillion cubic feet of additional gas reserves might be divested from El Paso and allocated to New Com-

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1. Other applicants for acquisition mentioned possible projects for delivering gas to California. However, this was the most comprehensive and detailed plan submitted.

pany under the Court's direction to give New Company additional reserves to support a new project to California.

The full magnitude of the harm of El Paso's customers of such a loss of reserves is not shown in the record, because that question was not before the District Court.

However, it is quite certain that El Paso's ability to continue its existing deliveries to Petitioner would be greatly impaired in the near future. Furthermore, the cost of maintaining that deliverability might be far greater to El Paso and that greater cost might be passed on to Petitioner.

The immediate damage to the reliability of the gas supply upon which Petitioner is dependent is not alleviated by the possibility that at some future date the divested reserves might be used to support a new project to California. Petitioner would have no assurance of the date on which new deliveries would commence, the volumes of gas it would receive, its cost; or that it would receive any gas at all from such a new project.

Issues which may have a far-reaching effect on the welfare of California consumers and on the ability of Petitioner to serve the needs of its customers must be decided on the basis of evidence, yet on remand the District Court seems tied by the mandatory nature of the language of the Opinion. Most certainly the Court did not truly mean that the District Court should transfer sufficient reserves for a new project to California if such transfer would do great harm to California.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully asks for a rehearing on the issue of the transfer of additional reserves to New Company (although in fact no hear-

ing has yet been held on this issue), if a rehearing is necessary to change the wording of the opinion. Petitioner requests, in the alternative, that the Court *sua sponte* change the language of the Opinion to eliminate its harm to California. The Court has not only the inherent power to police its own mandates, but it has the *a fortiori* power to correct and make clear its own Opinion to avoid unanticipated damage to the very segment of the public it purports to benefit by its decision.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing or in the Alternative *Sua Sponte* Modification of Opinion is presented in good faith and not for delay.

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